No. 90-900 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

VS.

THE CITY OF NEW YORK AND THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF

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Questions Presented

I. Did the Court of Appeals err in holding that the New York City Landmarks Law does not constitute a substantial interference with the ability of Petitioner and its congregants to freely exercise their religion?

II. Did the Court of Appeals err in holding that the Landmarks Law was a law of "general applicability"?

III. Did the Court of Appeals err in failing to hold that there was no compelling state need to interfere with the free exercise of religion?

IV. Did the Court of Appeals err in denying petitioner's "Entanglement"and "Takings" claims?

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INTEREST OF THE AMICI CURIAE

The Archdiocese of New York and the Diocese of Brooklyn are the Roman Catholic Church entities serving New York City. Together they offer massive spiritual and human welfare service to all, without regard to creed, in a City of about 7,200,000, of whom about 2,750,000 are Catholics organized in about 435 parishes having over 1,260 buildings.

In addition, the Archdiocese of New York similarly serves seven Counties north of New York City having a population of about 1,770,000, including about 850,000 Catholics organized in 199 parishes having over 600 buildings.

The New York State Catholic Conference is the instrument through which the Archdiocese of New York and the seven Catholic Dioceses throughout the State speak with one voice in the field of public affairs. They similarly offer service to all residents of New York State including about 6,685,000 Catholics organized in over 1,900 parishes having about 5,700 buildings.

Your *amici* are vitally interested in this case because over 100 communities throughout New York State and many more throughout the nation have enacted historic preservation laws which, under the guise of landmarking, retroactively "spot-zone" religious land and buildings to exalt the cause of architectural aesthetics above the spiritual and human-service mission which these resources were given to serve and which is the heart-core of our religious practice.

There is no need for such a perverse value system. In our country, beginning in Florida and the Southwest in the 1500's, our religious communities have provided, without the need for landmark legislation, by far, the greatest number of distinctive, lowrise buildings which those interested in architectural aesthetics have freely enjoyed. This deep-rooted religious tradition, going back millenia, will continue, subject, of course, to objective zoning and safety laws immediately applicable to all similarly situated owners. Nonetheless, when religious needs so require, aesthetics must yield to higher values.

It is our faith belief that our nation will prosper because we use our resources to conquer injustice and spiritual and human

deprivation, not because we preserve distinctive buildings. We ask this Court to restore to us our religious resources so we can practice that faith.

I. The Writ Should Be Granted Because the Interrelated Constitutional Issues Were Disregarded by the Court of Appeals and Profoundly Affect All the Religious Communities of Our Nation and Those They Serve

Twelve years ago the Court stated that "over the past 50 years, all 50 states and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance". *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 107 (1978)[1] The number of such laws has, by now, greatly increased. This situation has created a particular trauma for religious communities.

As the largest provider of distinctive buildings over the centuries, the religious communities now find that, when their religious needs have changed, their distinctive properties are being fossilized through landmarking. In a rapidly-changing society, where the spiritual and human welfare mission of Roman Catholics as well as that of other religious bodies is likewise changing, their need to adapt their resources to these changes is paramount.

Words sound empty if not rooted in the cold hard facts of reality. We therefore present here a small nationwide sampling of instances which have come to our attention wherein landmarking has unjustly impeded the mission of Roman Catholic communities. The other faiths can tell similar stories.

In New York City the pastor of Old St. Patrick's Cathedral put thermal pane windows on his landmarked school building to replace decrepit, but non-original, wooden windows. The three senior staff persons of the Landmarks Commission personally browbeat the aged pastor with threats of daily criminal

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[1] *Penn Central*, we submit, is not precedent in this case for the reasons set forth in St. Bartholomew's Petition herein and below at Point II. C.

fines and jail if he did not immediately remove the thermal windows and replace them with wooden windows in the presumed original style. When asked about the impact of this on the parish fuel and maintenance budgets and on the learning environment and health of 850 school children, they replied, "That's irrelevant". Tragically, that was a "legally" correct reply because, under the New York City "Landmarks Law",[2] people *are* irrelevant and the government thereby reverses basic Christian priorities by putting buildings before people and unjustly commandeers religiously dedicated property to enforce that perverted priority.

In Buffalo, New York, the parish population of St. Mary's Church had, for the most part, moved away. The church building was in great need of repairs for which there were no funds. The local landmark authorities refused to permit demolition of the building thereby forcing the church to sell the land, encumbered by its "white elephant", for a fraction of its value to a developer who agreed to preserve the building. However, the developer was able to gut the building and leave it unprotected because the authorities did not enforce their landmarks ordinance against him. As a result, it was destroyed by a fire. Thus, through the device of the landmarks ordinance, the developer profiteered on the church's property.

In Cleveland, Ohio, St. Joseph's Church, a cavernous structure, was totally unsuited for the parish whose membership had declined through demographic changes. In 1986 the parish was closed and the Diocese decided to sell the site and apply the proceeds to further the spiritual and human needs of people in other parts of the Cleveland. The local landmark authority declared the Church to be of historic significance on the grounds that it was the sole remaining building in a neighborhood which had been otherwise destroyed. It was the government itself, however, which had destroyed the neighborhood by demolishing buildings for the construction of roadways and a community college, presumably paying owners fair compensation for their

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[2] This law is embodied in The New York City Administrative Code, Chapter 8-A, §§ 25-301 - 25-321, and is referred to herein as the "Landmarks Law". All "§" references are to this Law.

condemned properties. The church received no compensation but instead is burdened with added expense and liability. To date, the City has resisted every attempt of the Diocese to demolish the unsafe structure, preferring architectural aesthetics to human life. Thus, the church is forced to retain a derelict, and is deprived of the resources needed for religious use in other parts of Cleveland.

In Oakland, California the Cathedral and a parish church were ravaged by the devastating earthquake of October 1989. The cost of repairing these structures exceeds $9 million. The City delayed the issuance of demolition permits, to which the Church was legally entitled, in order to allow time for the two buildings to be landmarked so as to establish governmental control over the properties, thereby depriving the Church of its right to demolish and reconstruct the churches as it saw fit in light of the spiritual and ministerial needs of the religious community.

In Santa Rosa, California, the Diocese desires to make some of its churches seismologically safe. This, of course, would change the appearance of these structures. The preservationists, using the local landmarks ordinance, are blocking this. To the preservationist mind, the preservation of an old building is of greater value than the preservation of human life.

Every governmental action chronicled above would be "legal" under the New York City Landmarks Law.

The above examples geographically represent a cross section of the nation but numerically represent only the tip of the iceberg. All paint a portrait of a stark religious future for religious bodies if unjust preservation laws are allowed to continue to freeze in perpetuity their real property which is their major, and often only, significant material resource.

The Supreme Court of the State of Washington decided that the landmarking of a Seattle church was an unconstitutional interference with the free exercise of religion. *First Covenant Church of Seattle* v. *City of Seattle*, 114 Wash. 2d 392, (1990), cert. pending. The City of Seattle has now petitioned the Court

for a writ of certiorari, further evidencing the great importance of this issue, nationwide.

Granting that the cause of historic preservation is, if justly and constitutionally activated, a legitimate governmental interest, it is far from the highest governmental interest and ranks well below the governmental interest in preserving religious freedom, in encouraging private-sector human welfare programs, in preventing confiscation of private (religious) resources, and in preventing disparate and unjust treatment as among equally situated owners. These interrelated constitutional interests affecting citizens, especially the poor, in every State of the Union were disregarded by the Court of Appeals and have never before been considered by this Court in a land use case.

II. The Writ Should Be Granted to Review the Denial of Petitioner's First Amendment Claims

A. The New York City "Landmarks Law" Constitutes an Interference with the Ability of Petitioner and its Congregants to Freely Exercise Their Religion.

A most fundamental religious belief of St. Bartholomew's and of all Christian faiths is lampooned in the City's brief to the Court of Appeals which states: "Plaintiff (St. Bartholomew's) does not contend that it is theologically compelled to build the 47 story office building", (p. 29). If, in a given time and place, that is what should be done in order to release religious resources to serve religious purposes, that is precisely what petitioner and its supporting *amici* do contend. Likewise, the Court of Appeals, in equally offensive language, trivialized St. Bartholomew's stated faith belief by stating: "(N)o one seriously contends that the Landmarks Law interferes with substantive religious views." (Dec., p.12). No one, that is, except St. Bartholomew's whose property is at risk, and it's supporting *amici* who speak for a very broad spectrum of Jewish and Christian faiths in our nation.

Since the City and the Court of Appeals deign to evaluate our "religious views" as being not substantial, thereby determining that our religious profession is made in bad faith, we feel

it necessary to explain in some detail the centrality of the religious teaching at issue in this case.

The question is: Is it merely optional or is it mandatory upon Christian communities to use for religious purposes *all* resources contributed to them? Put inversely, would it be contrary to religious teaching for a Christian community to allow a portion of Church resources to be used to support a non-religious value system, or even to lie fallow?

The "substantive religious view" of all Christian Churches is that *all* resources dedicated to religious use must be used for religious purposes. The "substantive religious view" of the City is that religious resources may, under penalty of criminal fines and imprisonment, be forced by the government to lie fallow, i.e., to serve the cause of historic preservation.

For Christians, the definitive answer to this question is given by Jesus Christ in His "Parable of the Ten Gold Coins", sometimes referred to as "The Parable of the Talents". In this Parable a nobleman, prior to leaving for a distant country to be made king, gives three chosen servants ten gold coins each, commanding the servants to "(e)ngage in trade with these until I return". Upon his return as king, he praised the two servants who had gained an increase through trade and condemned the third servant who had let his coins lie fallow and unproductive. Gospel of Luke, chapt. 19, verses 11-24; see also, Gospel of Matthew, chapt. 25, verses 14-27[3].

The teaching of Jesus Christ in this Parable is deeply rooted in the ancient Judaic wellsprings of the Christian faith. Thus, in the Book of Exodus, God says: ". . . all the earth is mine." (chapt. 19, verse 5(b)). In the 1st Book of Chronicles, chapt. 29, verse 11(b), King David prays: ". . . For all in heaven and earth is yours; (f)or everything is from you, and we only give

[3] All biblical quotations herein are from *The New American Bible*, Catholic Book Publishing Co., New York, 1970. The texts are virtually the same in the modern bible translations used by all major Christian faiths.

you what we have received from you . . .". These are but a few of the many Biblical texts that teach that Christian communities and their leaders may not allow *any* of their dedicated assets to be diverted from God's purposes.

What are God's purposes? For the Christian they are worship of God and service to those in spiritual, economic, medical or other need. This is embodied in the strong words of Jesus Christ: "I assure you, as often as you did it for one of my least brothers (specifying the hungry, the sick, the impoverished, the disadvantaged), you did it for me." Gospel of Matthew, chapt. 25, verse 40.

This teaching, that no dedicated resource is exempt from religious useage, especially for those in need, is strongly emphasized in the worldwide public prayers of both the Roman Catholic and Episcopal Churches. Thus, in the Episcopal *Book of Common Prayer*[4], there are a number of prayers for public worship, such as the following:

> "(Lord), (g)ive us a reverence for all the earth as your own creation, that we may use its resources rightly in the service of others and to your honor and glory." (p. 388).

> "For the just and proper use of your creation; for the victims of hunger, fear, injustice, and oppression." (p. 388).

Likewise, in the worldwide public prayer of the Roman Catholic Church, the following litany is offered: " . . . We are people of light giving food to the hungry . . . clothing the naked and sheltering the homeless . . . ."[5]

In Christian belief, buildings and real estate have absolutely no status except to the extent they are promoting divine worship and human service programs. In fact, for the Christian,

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[4] The *Book of Common Prayer* (Episcopal), The Church Hymnal Corporation, and the Seabury Press, New York, 1979.

[5] *Seasonal Missalette*, "Penitential Service", Vol. 6, No. 4, p. 49 (1991), J.S. Paluch Company, Inc., Schiller Park, Illinois, published annually. See *The Roman Missal-Lectionary For Mass*, Catholic Book Publishing Co., New York, 1970, *passim*, for the assignment of such scriptural readings for public worship.

the "temple" is no longer a building but is the body of believers functioning together with Jesus Christ as the Head. The Apostle Paul, in his letter to the Christian community at Ephesus, explains this: "Through him (Jesus Christ) the whole structure is held together and grows into a temple sacred in the Lord; in him you are also being built together into a dwelling place of God in the Spirit." Chapt. 2, verses 21-22. See also, Gospel of John, chapt. 2, verses 18-22; Paul's Letter to the Church at Colossae, chapt. 1, verses 18(a), 24(b).

For the Christian, theory and exercise are one and the same, following the Biblical command: "Act on this word. If all you do is listen to it, you are deceiving yourselves." Letter of James, chapt. 1, verse 22. The Court of Appeals, in using the expression "substantive religious views", attempts to befog the Bill of Rights' guarantee which is, not that we may freely hold religious views, but that we may freely "*exercise*" those views.

The teaching evidenced by the foregoing Biblical passages and official prayers may be summarized as follows: The chosen leaders of every Christian community must diligently use *all* resources held by the church to promote the worship of God and service to fellow humans, especially the poor. Buildings (temples) have no value in comparison to the worth of our fellow humans. When a religious building has, due to societal, financial, population or other changes, ceased to be useful to serve the mission of the church, it is to be, as necessary, altered or demolished. The Landmarks Law forces a religious community and its leaders to hold and manage religious resources in perpetuity, as custodians of a shrine to the Spirit of Architecture.

When a building erected to serve a Christian community instead becomes its master, we have what is, in Christian belief, idolatry – the exaltation of things above God and above humans made in His image. This is, of necessity, the religious position of the City and its preservationist *amici* in this case although, to obscure that fact, they blithely say that "The (Landmarks) Commission does not in any way involve itself in defining the group's mission or defining its priorities". [City's brief below, p. 37]. Yet in forcing the use of religious resources to support a non-religious purpose that is precisely what the City does.

We have summarized this religious teaching for the exclusive purpose of showing that the Landmarks Law heavily impacts, not an obscure theological theory, but a basic teaching proclaimed in the Bible and in the worldwide public worship of petitioner and the Roman Catholic Church and indeed of all Christian faiths. We are under no obligation to justify this teaching. Those who differ are rightly free to use their own resources in a different priority without any economic or other pressure from the government. It is not within the competency of any municipality or court to nullify this teaching by labelling it as not one of Christianity's "substantive religious views", so as to assign, even to a church's own bricks and mortar, a higher priority than the church itself assigns. In short, the Church receives its missional priorities from God, not from the government.

The absolutist priority of the theology of the City is best revealed in the statement in the City's brief below that "(O)nce a building (the Community House) is razed it is lost to all future generations." (p.35). Thus, the loss of one small, undistinguished, subsidiary building out of the 14,700 existing City landmarks is posited as an ultimate loss, transcending the spiritual and human loss to all those present and future generations who can never be served because millions of dollars otherwise available for such ministries have been diverted by the government without compensation and under criminal penalties to serve the non-religious cause of historic preservation. In this, the City shows little hesitancy in leaping over the wall of separation between church and state. This is a clash between religious humanism and inhumanism, using religious resources, by governmental force, to finance the latter value-system.

The City claims that the "fact" that St. Bartholomew's acquiesced in the landmarking of its underlying land and buildings is of great importance. [City's brief below, p. 32.] The Court of Appeals also thought this of significance. [Dec. p.6]. The necessary implication is that what the church now claims to be a basic Christian teaching mandating full religious use of dedicated resources was not deemed a basic teaching at the time of the landmarking or subsequently, i.e. that the church's claim at this "late date" that its teaching is basic is hypocritical, inconsistent and in bad faith. In fact, there is no inconsistency

whatsoever. The church initially acquiesced in its designation only because induced to do so by a promise given by the Landmarks Commission. In its Designation Report, the Landmarks Commission said:

> "By this designation of the Landmark and the Landmark Site, it is not intended to freeze the structures in their present state or to prevent . . . the erection of other structures to meet the church's requirements in the future."[6]

By 1980 the "church's requirements" *had* changed by reason of gradual change over the years in population, financial conditions and, especially, new societal needs. In that year the Church realized the Community House had outlived its usefulness and had become a retardant to the Church's mission, especially in view of the more recent and disproportionately large increase in the value for religious programs of the underlying land (the "landmark site"). It has been embroiled with the Landmarks Commission ever since, because that Commission dishonored its original promise.

It is wholly consistent with this teaching on the full religious utilization of dedicated resources that churches comply at their own expense with traditional "police power" governmental regulations because it would be considered wrongdoing for a church to maintain a building as a "nuisance", i.e., as a firetrap or in an unsafe or unsanitary condition, dangerous to human life, health or morals. This is because Christians value human life and welfare as a principle absolutely superior to the preservation of even their own bricks and mortar. The applicable Biblical text is, in words of Jesus Christ, "then repay to Caesar what belongs to Caesar and to God what belongs to God", Gospel of Luke, chapt. 20, verse 25(b), in that Caesar (the government) is, in such cases, acting to protect human life and health.

We ask this Court to recognize as fundamental the distinction between requiring those who have endangered the public welfare by creating a "nuisance" to remedy it at their own

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[6] Designation Report, March 16, 1967, p. 4.

expense and requiring those who have freely conferred a benefit on the public in the form of a distinctive building to maintain that benefit in perpetuity when its maintenance has come to be an impediment to the religious worship and ministry the building formerly promoted.

Likewise it is fully consonant with the teaching on full religious utilization of dedicated resources that the churches comply with zoning laws of immediate and equal applicability to all owners within a rational zone because each owner benefits from the identical restrictions imposed on his neighbor – the "reciprocity of advantage" referred to in the dissenting opinion in" *Penn Central*, 383 U.S. at 140. In fact, St. Bartholomew's asks only to be permitted to build a legal building in compliance with the zoning law, just as its commercial neighbors who, though eligible for landmarking, have not been landmarked, who put their profits into their own pockets instead of returning them to the community through religious and human welfare services and who have never provided low-rise buildings for the free enjoyment of all.

The issues presented above profoundly affect the future of all religious communities in this nation and those they serve, and have never before been presented to the Court in a land use case.

B. The Governmental Interference with the Free Exercise of Religion in this Case Is Substantial.

The Courts below held that there can be no "free exercise" violation (and no "unconstitutional taking")so long as the Church can continue its present operations in its present Community House. St. Bartholomew's, in its Petition, makes it clear that these holdings are erroneous, (pp. 21-28). However, for an additional reason not heretofore considered, the Court of Appeals erred in this regard in that it necessarily, but incorrectly, assumed that the Landmarks Law impacts only the "landmark" i.e., the Community House. This is not so. Far more significantly, the Landmarks Law requires the Landmarks Commission, when it designates a "landmark" (building), to also designate, and fix the boundaries of, a "landmark site" (underlying land). §25-303 b.

In addition to the "landmark" itself, all other "improvements" (such as St. Bartholomew's terrace gardens) and all future buildings on this underlying land are subject to control by the Landmarks Commission in perpetuity whether or not these improvements are 30 years old, and without any need to allege their "special character". §25-304 b.; §25-305 a.(1); §25-306 a.(1); §25-307 a., c. This is how the Landmarks Commission can seek to dictate the size, shape and appearance of the future building proposed by St. Bartholomew's for the "landmark site" even though it would not be 30 years old and does not yet have any "special character". Thus, the heart of the Landmarks Law is the power of the City to control a tract of underlying land, the "landmark site", not merely the "landmark" on it, through all future generations to serve the present and future "needs" of historic preservation. Inconsistently, the City now asks the Court to consider only the value and useability of the "landmark" when assessing the impact of the Landmarks Law on the Church's ability to carry on, expand, change and/or relocate its religious mission now and in the future. Under a proper construction of the Landmarks Law, the proper measure of its impact on petitioner is the lost value of the "landmark site" (the underlying land), which is over 85% of the value of the" building lot ("landmark site") on which the Community House stands. This loss is estimated at about $140 million. Petitioner and its congregants are now compelled to administer this resource in a manner incompatible with their religious beliefs. This, we submit, constitutes a most serious interference with the ability of the congregants and leadership's to freely exercise their religion.

This Court in *Penn Central* did not consider this basic point in its evaluation of what is or is not "taken".

C. Because the Landmarks Law is Not a Law of General Applicability the City Must Show, But Has Failed to Show, a Compelling Governmental Need to Interfere With the Free Exercise of Religion.

1. The Landmarks Law is Not a Law of General Applicability.

The Court of Appeals below erroneously characterized the landmarks law as a law of "general applicability saying it applies

to '[a]ny improvement, any part of which is thirty years old or older, which has special character . . .' ". (Dec. pp. 12-13). In fact, nothing could be further from the truth. The Landmarks Law applies only to that portion of all eligible sites and districts that have been selected for landmarking from time to time in the unfettered caprice of the Landmarks Commission which is limited by no meaningful standards[7]. The vast majority of eligible sites have been ignored, while some eligible sites have inexplicably been rejected for, or freed from, landmarking, as noted below.

The Landmarks Commission has not landmarked the world-famous Cathedral of St. John the Divine in Manhattan, but has landmarked many humdrum apartment buildings.

When a unique treasure of great historical significance was recently found in the form of the virtually intact hull of a large 18th Century, American-built merchant ship, the Landmarks Commission staged a parade in honor of the find but let the developer proceed to destroy it by erecting an office tower on the site because it would have been too expensive (for the developer) to save the hull.

The Landmarks Commission permitted Marymount School, housed in three famous Manhattan beaux-arts mansions, to install a huge, ugly "bubble" gymnasium on top of the mansions on the grounds that the School would otherwise suffer the statutory "insufficient return", despite the fact that the School was fully capable of carrying out its existing programs in its existing building and was not required to show that, through a fund-raising program, it could not increase its profitability to overcome its "insufficient return". One may only speculate why St. Bartholomew's was not accorded "equal protection" in each of these areas.

St. Bartholomew's is itself an example of the lack of general applicability of the Landmarks Law. Every building on the City block that includes St. Bartholomew's, other than St. Bartholomew's, is built to fully exploit the value of its underlying

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[7] To be eligible for landmarking, it is necessary only that a building have at least some "special character" — a phrase so vague that virtually no building can be said to be ineligible. Characteristics of historicity or aesthetics are not necessary for landmarking. §25-302 n.

land. These buildings "dwarf" St. Bartholomew's Church and are crassly incompatible with its architecture. St. Bartholomew's now proposes to build a compatible building in place of a very undistinguished landmark (the Community House), but is prevented by the Landmarks Commission because its proposed new building would dwarf the already-dwarfed church structure.

Other examples of such "legal", but capriciously inconsistent, decisions abound. Nothing in the Landmarks Law prevents the Landmarks Commission from so acting. Thus, this is not an instance of a good law wrongly applied, but of a bad law "legally" applied.

In *Penn Central*, this Court stated "[L]andmark laws are not like discriminatory, or 'reverse spot' zoning . . . which arbitrarily singles out a particular parcel for different, less favorable, treatment than the neighboring ones". 438 U.S. at 132. In the light of the foregoing examples, we respectfully submit that this statement is factually incorrect, recognizing that the detailed operation of the Landmarks Law apparently was an area not seriously contested in that case. The quoted words, on the contrary, accurately describe what has happened to St. Bartholomew's.

In *Penn Central*, at p. 132, the Court further stated that the New York City Landmarks Law "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the City". 438 U.S. at 132. Again, we respectfully submit that this statement is factually incorrect. There is no requirement that a building or a historic district have "historic or aesthetic interest" – merely that they have at least some "special character". Further, the arbitrary and capricious selectivity of the Landmarks Commission, briefly noted above, shows there is no City-wide "comprehensive plan." Thus, the Landmarks Commission Chairperson has publicly announced that the Commission, having concentrated on Manhattan for its first 25 years, will now seek to concentrate on the other four boroughs[8]. The landmarks law permits

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[8] Presentation of the Chairperson of the Landmarks Preservation Commission to the Real Estate Board of the City of New York, April 16, 1990.

this, thereby further demonstrating the lack of a comprehensive city-wide plan, i.e., a lack of general applicability.

The City has erroneously proffered several cases as precedent, but these cases are not relevant because they all involved laws that, unlike the Landmarks Law, were in fact laws of general applicability as the following summaries show.

> *In Jimmy Swaggart Ministries* v. *Board of Equalization*, 110 S.Ct. 688 (1990), the law imposed a specified, immediately applicable tax on *all* sales of certain articles. In *Braunfeld, et al.* v. *Brown, Commissioner of Police of Philadelphia, et al.*, 366 U.S. 599 (1961), the law was applicable upon its effective date to *all* businesses which thereupon had to close on Sundays. In *Employment Div., Department of Human Resources of Oregon* v. *Smith*, 110 S.Ct. 1595 (1990) the law prohibited all use of specified drugs (including peyote), not excluding religious use, and was effective immediately as to all persons[9]. In *Lyng, Secretary of Agriculture, et al* v. *Northwest Indian Cemetery Protective Assn., et al.*, 485 U.S. 439 (1988), the government built a road on its own land near an Indian burial and religious area, an action that made an immediate and equal benefit available to all members of the public[10].

Each of the above cited cases involved a law that had objective, ascertainable criteria by which future conduct could be clearly governed, and each was immediately and simultaneously applicable to all covered persons or transactions. In sharpest contrast, upon the effective date of the Landmarks Law, nothing became landmarked because the law merely authorizes the

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[9] We submit that, in addition, *Smith* is inapplicable in this case for the reasons set forth in petitioner's brief herein.

[10] Furthermore, in *Lyng* the government was dealing with its own land. In the St. Bartholomew's situation, however, the government imposed a burden on private property that destroys for religious purposes about 85% of the value of the "landmark site".

future landmarking of districts and buildings and, simultaneously, of the land under and/or surrounding those buildings, at the future whim of the Landmarks Commission which is constrained by no meaningful criteria and is under no duty to act. The Landmarks Law permits the Landmarks Commission to pick and choose its victims by landmarking one building with "special character" and ignoring its equally eligible neighbor – which is precisely what has happened to St. Bartholomew's.

Finally, a law cannot be said to be of "general applicability" when it can "legally" be applied to one eligible property or district in, say, 1967 and not to another eligible property or district until 25 or 125 years later, or not at all.

2. There Is No Compelling Governmental Need In This Case To Interfere With The Free Exercise Of Religion.

Because the Landmarks Law is not a law of general applicability, the City has the burden to prove that there is some compelling governmental need to block the demolition of St. Bartholomew's Community House[11] . The City has made no attempt even to address this burden. For example, promotion of tourism is one of the stated objectives of the Landmarks Law, §25-30l, but the City offers no showing that there would be any decline in tourism if the building were demolished.

In fact there is no such need. The Community House is a small subsidiary building, the name of whose architect is, if known, never mentioned. It is said merely to be consonant in style with the nearby church building and no independent characteristic is ascribed to it. A far larger and more sophisticated example of the same architectural style (St. Bartholomew's church building) will remain on the "landmark site" for the free enjoyment of the public. The Community House is one of the more unimpressive of the 14,700 landmarked structures in the City. The need to preserve this small building, in competition with

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[11] There are additional reasons why the City has this burden. See petitioner's brief herein, p. 13.

the resultant great loss of religious and human welfare programs and tax revenues, is insignificant.

The City itself rates its need for landmarks very low as it is notorious for allowing the landmarks it owns to deteriorate.

In a City (and nation) experiencing increasing difficulties in providing affordable housing and basic medical care for the poor, in rehabilitating drug addicts, and in providing for the needs of abused children, battered women and other crime victims, we cry out against a law that, for aesthetics, hamstrings the religious community which is, by far, the chief private-sector provider of help to these persons and, if quality be taken into account, perhaps an even greater provider than the City itself. We cry out against a fiscally fragile City government that is curtailing education, closing firehouses and reducing basic services but yet defends a law that causes the abandonment of $5 million per year[12] in potential real property taxes to preserve a minor landmark to please an aesthetically sensitive, but humanly insensitive, minority. There is no governmental "need", much less a compelling need, to preserve this state of affairs.

D. The Landmarks Law Necessitates an Unconstitutional Governmental "Entanglement" With Religion.

A reading of the decisions of the District Court, the Court of Appeals and the City's brief below should amply indicate the extraordinary involvement of the government in participating and controlling the day-to-day decisions of a religious body in the prioritization of its expenditures and the control of its plans for the modification and expansion of its religious programs. Particularly entangling is the requirement that St. Bartholomew's require its members to participate in a forthcoming fund-raising compaign of indefinite duration, which would have to be monitored by the Landmarks Commission to insure that all the donations received were used for historic preservation and not for any religious purpose. The Church members would

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[12] This figure is a conservative estimate of the annual real property tax that would be generated by St. Bartholomew's proposed new building to prevent unfair competition with the commercial sector.

thereby be effectively converted into a historic preservation society — contrary to their substantive religious beliefs. Further, the fact that the Landmarks Law purports to control the Church's underlying land (the "landmark site") in perpetuity means that the size, shape and appearance of all future buildings on that site, as well as the Church's future plans for the alteration or demolition thereof, would be subject to the control of the non-neutral Landmarks Commission.

The provisions of the Landmarks Law create such a preservationist bias and are so lacking in objective standards, in economic reality and in meaningful time-frames that only in a case of extreme emergency would a religious owner embark upon this costly and futile process which gives no hope of relief at the administrative level. The chilling effect of the Landmarks Law upon religious freedom is shown by the fact that, in the 25-year history of the Law, no religious building has ever been freed of landmarking and no religious owner has ever had its desired alteration plans approved.

If the foregoing does not evidence unconstitutional "entanglement", nothing does.

III. The Writ Should Be Granted to Review the Denial of Petitioner's Fifth Amendment "Takings" Claim.

New York City has, without compensation, destroyed, for religious usage, about $140 million, consisting of over 85% of the value of the building lot (part of the "landmark site") on which the petitioner's Community House (the "landmark") stands. We submit that the sheer magnitude of the loss constitutes this as a "taking". This is discussed in greater detail above at Point II. B. and in petitioner's brief herein.

That property of great value is actually "taken" from St. Bartholomew's is particularly shown by the fact that the Landmarks Law forces the Church to donate a major economic benefit to its commercial neighbors whose full-zone buildings command much higher rents because they enjoy the light, air and views made possible only by the low size of their landmarked neighbor.

Such "easements of light and air" are marketable commodities often selling for millions in New York City. Commercial developers have not been slow to support the landmarking of their "neighbors". For example, the owners of the tall building at 90 Broad Street in Manhattan use the renting slogan, "Where The Landmarks Protect Your Light" and explain that their tenants' "wraparound sunlight and views are protected by the landmark Fraunces Tavern block"[13]. An owner of a commercial high-rise adjacent to St. Bartholomew's has likewise vigorously objected to the de-landmarking of the Community House. This shows that, in addition to constituting an uncompensated "taking", the Landmarks Law, unlike a zoning law, provides no reciprocity of advantage and is not a law of equal applicability.

In *Nollan et ux.* v. *California Coastal Commission*, 483 U.S. 825 (1987) this Court has held that even owners not constitutionally protected from governmental interference could not be required to donate an amenity (easement over their beachfront property) to the public in return for a permit to build a legally, zoned beachfront house. Through the Landmarks Law the City deprives a (religious) owner of its right to build in compliance with the zoning law and forces that owner to contribute an amenity (landmarked building) to the public in return for nothing, and further fossilizes the owner's underlying land (the "landmark site") so as to make it unavailable for religious uses and further burdens the owner with the extra costs, (over and above its obligation not to create a "nuisance"), of preserving the original appearance of the amenity.

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[13] Illustrated mailing of Jones Lang Wootton, renting agents for 90 Broad Street, Manhattan.

Conclusion

In the formative years of our Republic, the Court posed the question: "To what purposes are powers limited, and to what purpose is that limitation committed to writing if these limits may, at any time be passed by those intended to be restrained?". *Marbury* v. *Madison*, 5 U.S. (1 Cranch), 137, 138 (1803) (Marshall, C.J.). What, then, is this Court to say today of a law that confers on a governmental commision power without limits to arbitrarily select owners to be landmarked and to exempt other eligible owners – of a law that penalizes benefactors of society and rewards non-benefactors – of a law that values structures more than human needs – of a law that, diverts religious resources to finance a non-religious cause – of a law that trivializes basic religious beliefs and compels believers to conduct themselves in a manner violative of those beliefs.

To consider this novel combination of interrelated issues, and for all the reasons set forth herein and in petitioner's brief, your *amici* respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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